

State Personnel Board, State of Colorado

Case No. 97 B 144

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

CHARLES L. NIETO,

Complainant,

v.

DEPARTMENT OF HUMAN SERVICES,
DIVISION OF YOUTH CORRECTIONS,
LOOKOUT MOUNTAIN YOUTH SERVICES CENTER,

Respondent.

Hearing on this matter was commenced on July 9, 1997 before Administrative Law Judge Margot Jones. At such time, the matter was convened, via telephone, in which the parties entered their appearances before the Board. No evidence was admitted at that time. Subsequently, on September 29, 1997, the Board issued a Notice of Change in Administrative Law Judge and Location of Hearing. No objection was raised as to the change in administrative law judge subsequent to the Notice Of Change or at the time the hearing was reconvened. An evidentiary hearing was held and completed before G. Charles Robertson, Administrative Law Judge, on October 14, 1997 at 1120 Lincoln Street, 14th Floor, Denver, CO 80203.

Respondent, Department Of Human Services, Division Of Youth Corrections, Lookout Mountain Youth Services Center ("LYC") was represented by Thomas S. Parchman, Assistant Attorney General. Complainant, Charles L. Nieto, appeared *pro se*.

LYC's witnesses included: (1) Charles L. Nieto, Complainant; (2) Dr. Bob Anderson, Principal of LYC; (3) Ann Drake, Program Assistant at LYC; (4) Buddy Williams, faculty member at LYC; (5) Paul Benbrook, faculty member at LYC; (6) Susan Law, faculty member at LYC; and (7) Patricia L. Kirk, Assistant Director at LYC.

LYC's exhibits 1, 4, 6, 7, 8, 9, 10, 11 were admitted without objection. LYC's exhibits 2, 3, and 5 were admitted over objection.

Complainant testified on his own behalf. Complainant did not proffer any exhibits. Complainant failed to call witnesses specifically listed in his prehearing statement. However, Complainant endorsed the witnesses called by LYC and, as a result, Complainant was permitted to conduct direct and cross-examination of LYC's witnesses.

MATTER APPEALED

Complainant appeals the disciplinary termination of his employment. For the reasons set forth below, LYC's actions are upheld.

ISSUES

1. Whether complainant committed the acts for which discipline was imposed;
2. Whether the discipline imposed was within the range of alternatives available to the appointing authority; and
3. Whether the actions of the appointing authority were arbitrary, capricious, or contrary to rule of law.

FINDINGS OF FACT

1. LYC is responsible for the detention of juveniles ("residents"), subsequent to an adjudication process, who have been placed in an extensive long-term, residential treatment facility. The residents have committed violent and sexual offenses, as well as property offenses.
2. Residents detained at LYC are sometimes affiliated with gangs.
3. Prior to July 1995, LYC embraced a "gang group" philosophy which allowed residents of the facility to associate with their fellow resident gang members.
4. Subsequent to July, 1995, LYC employed, and continues to employ, a treatment tool known as normative culture (also known as Positive Peer Culture) in the process of caring for the juveniles placed in the facility. This tool consists of creating a positive peer culture for the entire community at LYC, including residents and staff. Normative culture is established by using a set of positive norms which are to be modeled by staff and all members of the LYC community. Normative culture is a means of treatment to

provide rehabilitation for residents and to teach juveniles positive norms of behavior in order that such norms are instilled in the residents. Activities for the residents are designed to prevent members of any particular gang from consistently and solely interacting with one another. As part of establishing and promoting a normative culture, LYC's staff is prohibited by LYC's Rule 9 to facilitate or promote gang activity.

5. The culture promoted by gangs, and gang affiliation, is incongruent with the treatment tool of normative culture. As a result, no actions or activities associated with gang activity are promoted. The taking of photographs of residents of LYC is considered to promote gang-related activity. This is a result of any such photographs being used by discharged residents to demonstrate their allegiance to their gang despite being detained at LYC. Such a consideration existed prior to, and subsequent to, July, 1995.
6. In addition, because of the type of residents detained by LYC, and because these residents are primarily juveniles, the issue of confidentiality of residents is addressed in the Division of Youth Corrections Manual, Chapter 15.
7. In order to preserve the residents' confidentiality, it is the policy and practice of LYC to limit the taking of photographs of its residents except under specific situations. Photographs are allowed to be taken (1) during particular sports activities, (2) during graduation ceremonies, and (3) during special occasions. The ability of staff to take photographs of residents during sports events, or other special events such as Cinco de Mayo, requires permission from LYC's principal.
8. LYC's policy with regard to the prohibition of taking photographs of residents was discussed at regularly scheduled staff meetings.
9. Subsequent to March 1995, Complainant was a YSC I at LYC and was assigned to the Intake/Security unit at LYC. Complainant regularly attended such staff meetings as part of his regular job responsibilities. During such time, Complainant had received (1) a corrective action for aiding a resident in obtaining an early release from LYC without permission from the treatment team; (2) a corrective action for inappropriate taking of annual leave; and (3) a corrective action for violation of timekeeping procedures.
10. From July, 1995, Complainant's appointing authority was Patricia L. Kirk and he was co-supervised by Ms. Kirk and the principal of LYC, Dr. Bob Anderson.
11. On May 22, 1995, prior to the implementation of the normative culture model, Complainant was issued a disciplinary action pursuant to the State Personnel System Rules and Regulations, Chapter Eight. The grounds for the disciplinary action were that Complainant was "allowing gang members to dress in their colors, [the] taking of

pictures of those gang members, and taking pictures with those gang members.”

12. The May 22, 1995 disciplinary action cited Complainant for being in violation of Rule 9, with regard to promoting or encouraging gang activity. As a result, disciplinary action was imposed in the form of a reduction in step from Step 6 - Grade 87 to Step 4 - Grade 87, for a period of one month.
13. On March 27, 1997, Complainant removed at least two individual students from faculty member Susan Law's class for approximately 40 minutes.
14. On March 28, 1997, Complainant again removed students from another faculty member's class. Complainant was observed by faculty members participating in the taking of photographs of LYC's residents in the facility auditorium. The residents were not all in LYC attire, but rather, some were in street clothes.
15. During the course of another investigation involving a complaint from the community near LYC, it was determined that photographs had been taken of residents in the facility's auditorium and the residents were not appropriately dressed in the attire of LYC. Three residents were questioned as to whether or not photographs had been taken of residents.
16. The investigation was expanded and staff members were questioned as to whether or not photographs had recently been taken of residents. A search was also conducted but failed to produce any photographs.
17. On April 10, 1997, Complainant was mailed a Notice of an R8-3-3 meeting to consider the administration of disciplinary action based on information received during the investigation indicating that Complainant had taken photographs of residents.
18. An R8-3-3 meeting was held on April 21, 1997. In attendance were Patricia Kirk, Dr. Anderson, Complainant, and Cheryl Hutchinson, a representative from A.F.S.C.M.E. Ms. Hutchinson attended as a representative for Complainant. All parties participated in the R8-3-3 meeting.
19. Complainant denied taking pictures on March 27 and March 28, 1997 during the R8-3-3 meeting.
20. On May 2, 1997, the appointing authority determined that Complainant violated (1) LYC's Major Rule Violation 9 regarding gang activity; (2) Division of Youth Correction's Policy 3.7 Code of Ethics; and (3) Executive Order for Colorado State Executive Branch Employees regarding personal integrity and truthfulness. As a result, the appointing authority concluded Complainant violated State Personnel Board Rule 8-

3-3 (C)(2) "Willful Misconduct" and terminated Complainant's employment.

DISCUSSION

Certified state employees have a property interest in their positions and may only be terminated for just cause. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rules R8-3-3 (C) and generally includes: (1) failure to comply with standards of efficient service or competence; (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment; (3) willful failure or inability to perform duties assigned; and (4) final conviction of a felony or any other offense involving moral turpitude.

In this disciplinary action of a certified state employee, the burden of proof is on the terminating authority, not the employee, to show by a preponderance of the evidence that the acts or omissions upon which discipline was based occurred and just cause existed so as to impose discipline. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994).

In *Charnes v. Lobato*, 743 P.2d 27, 32 (Colo. 1987), the Supreme Court of Colorado held that:

Where conflicting testimony is presented in an administrative hearing, the credibility of witnesses and the weight to be given their testimony are decisions within the province of the agency.

LYC argues that Complainant, in the course of his employment with the Division of Youth Services, Lookout Mountain Youth Services Center, violated both LYC's and DYS's policies. LYC maintains that Complainant violated LYC's policy with regard to the promotion of gang-related activity by removing residents from classes on March 27, 1997 and March 28, 1997 and by participating in the taking of those residents' photographs without authorization. LYC maintains that Complainant had notice of the policy, and that the violation of the policy was grounds for discipline, as a result of (1) the policy having been discussed at numerous staff meetings, and (2) the fact that Complainant had been previously disciplined for the same behavior in 1995. In addition, LYC cites as grounds for the termination of Complainant's employment Complainant's violation of the Division of Youth Services Code of Ethics and the Governor's Executive Order demanding personal integrity and honesty of all state public employees.

Complainant admits removing residents of LYC from their classes but denies that he participated in photographing the residents. Complainant maintains he removed residents from class on both occasions to address security concerns and the residents' gang involvement. He

argues that the residents were not in street clothes when discussing gang related issues on March 27, and March 28, 1997. Complainant suggests the residents had removed a portion of their LYC issued clothes because it was warm where Complainant had gathered the residents in the auditorium. Complainant argues that because of his security responsibilities, he often removed residents from classes to conduct interviews with residents. At the same time, Complainant argues that he was incapable of conducting any such photography on March 28, 1997 because he was fulfilling his job responsibilities in other locations on the LYC campus. Complainant further maintains that he was not aware of any policy at LYC which prohibited the taking of photographs of residents. He attempts to support this argument by relying on the fact that photographs of residents occur on a frequent basis, and without approval.

Substantial evidence supports the conclusions of the appointing authority that Complainant was aware of LYC's policy with regard to promoting gang activity and the photographing of residents, and that Complainant violated that policy.

It is clear that Complainant was aware of LYC's policy with regard to the promotion of gang-related activity and the photographing of LYC residents. Testimony of faculty members substantiates that such a policy was discussed during faculty and staff meetings. In addition, Complainant had been disciplined before for similar behavior in 1995. While Complainant states that the change from a "gang group" to normative culture philosophy occurred at the time of the previous discipline and the previous discipline failed to provide him notice of LYC's "new" treatment philosophy vis-a-vis promoting gang-related activity, it is apparent that under either philosophy, the taking of photographs promoted gang-related activity. Such a conclusion is supported by the fact that LYC had a policy against promoting gang-related activity and photography under both treatment philosophies.

During the course of the investigation, residents of the facility indicated to the investigators that some members of LYC's staff had been taking photographs of the residents. In addition, faculty member Susan Law observed Complainant removing residents from their classes on March 27, and March 28, 1997. Testimony, as well as documentary evidence, further demonstrates that three members of LYC's staff directly observed Complainant taking photographs of at least four individuals in the school auditorium on March 28, 1997. At the time photographs were taken, some of the residents were in street clothes and not in LYC attire.

Complainant's testimony that he was unaware of LYC's policy with regard to the promotion of gang-related activity and photography is without merit and suggests his testimony is not credible given the fact that Complainant had previously received and acknowledged discipline under the same policy. In addition, the fact that three other faculty members observed his picture-taking supports the conclusion that his testimony lacks credibility.

The record supports that the discipline imposed by the appointing authority was within

the range of alternatives available to the appointing authority. Complainant had received three corrective actions in the two years proceeding this incident. In addition, he had received one disciplinary action for the same policy violation within 2 years of this incident. State Personnel Board Rule R8-3-1(A), 4 CCR 801-1, provides:

The decision to correct or discipline an employee shall be governed by the nature, extent, seriousness and effect of the act, error or omissions committed, the type and frequency of previous undesirable behavior; the period of time that has elapsed since a prior offensive act; the previous performance evaluation of the employee; an assessment of information obtained from the employee; any mitigating circumstances; and the necessity of impartiality in relations with employees.

In this instance, within two years of being disciplined for the same offense, Complainant committed another violation. Complainant provides no mitigating circumstances or any information for the behavior. Rather, he simply denies that the incident occurred. This despite the fact that numerous witnesses, both staff and residents, observed the promotion of gang-related activity by the taking of photographs of gang members. The seriousness of this incident is magnified by the fact that the taking of such photographs fails to promote the treatment tool of normative culture and, thereby, impairs LYC's ability to effectively support its residents. Complainant's acts are flagrant, serious, and constitute willful misconduct pursuant to State Personnel Board Rule R8-3-3(C), 4 CCR 801-1.

Section 24-50-125.5, C.R.S. provides, in part:

[I]f it is found that the personnel action from which the proceeding arose or the appeal of such action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless, the employee bringing the appeal or the department, [or] agency taking such personnel action shall be liable for any attorney fees and other costs incurred

Substantial evidence does not support such a finding in this case. No evidence was proffered indicating that this matter was instituted frivolously, in bad faith, maliciously, or as a means of harassment. In addition, the appeal of the personnel action taken is not groundless, despite the serious and flagrant violation, as a result of Complainant seeking a determination as to the level of discipline imposed.

CONCLUSIONS OF LAW

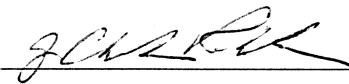
1. Complainant violated LYC's policy regarding the promotion of gang-related activity, and thereby committed the acts for which discipline was imposed.

2. LYC's actions were not arbitrary, capricious or contrary to rule or law.
3. The discipline imposed was within the range of alternatives available to the appointing authority.
4. Neither party is entitled to an award of attorney fees or costs in this matter.

ORDER

LYC's action is affirmed. Complainant's appeal is dismissed with prejudice.

Dated this 25th day
of November, 1997
at Denver, Colorado



G. Charles Robertson
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed

10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 ½ inch by 11 inch paper only. Rule R10-10-5, 4 CCR 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

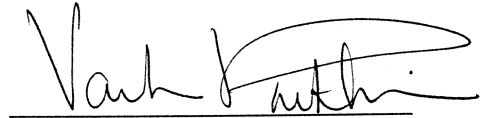
CERTIFICATE OF MAILING

This is to certify that on this 25th day of November, 1997, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Charles Nieto
1833 South Decatur
Denver, CO 80219

and in the interagency mail, addressed as follows:

Thomas S. Parchman
Assistant Attorney General
1525 Sherman Street, 5th Floor
Denver, CO 80203

A handwritten signature in black ink, appearing to read "Vark Parchman", written over a horizontal line.